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UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

WESTERN WATERSHEDS PROJECT, *et al.,* Plaintiffs, and RENO-SPARKS INDIAN COLONY and ATSA KOODAKUH WYH NUWU/ PEOPLE OF RED MOUNTAIN Plaintiff-Intervenor, v. UNITED STATES DEPARTMENT OF THE INTERIOR, *et al.,* Defendants	Case No. 3:21-cv-103-MMD-CLB **RENO-SPARKS INDIAN COLONY AND ATSA KOODAKUH WYH NUWU/ PEOPLE OF RED MOUNTAIN MOTION TO INTERVENE**

and)
)
LITHIUM NEVADA CORP.)
)
Defendant-Intervenor)
_____)

The Reno-Sparks Indian Colony and Atsa koodakuh wyh Nuwu/People of Red Mountain, by and through local counsel Julie Cavanaugh-Bill and out-of-state counsel William Falk and Terry Lodge (who are submitting *pro hac vice* applications and will comply with LR IA 11-2 within 14 days), hereby move for leave to intervene as plaintiffs in the captioned action as a matter of right, pursuant to Fed.R.Civ.P. 24(a)(2). Alternatively, the Reno-Sparks Indian Colony and Atsa koodakuh wyh Nuwu/People of Red Mountain move to be permitted to intervene as plaintiffs pursuant to Fed.R.Civ.P. 24(b).

In support of their motion, the Reno-Sparks Indian Colony and Atsa koodakuh wyh Nuwu/People of Red Mountain respectfully refer the Court to their memorandum of points and authorities in support of their motion, and the proposed complaint attached hereto.

Dated this 20th day of July, 2021.

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Memorandum of Points and Authorities

The Applicants-Intervenors Reno-Sparks Indian Colony, a recognized tribe and Atsa koodakuh wyh Nuwu/People of Red Mountain, an unincorporated association (together "Intervenors") submit this memorandum supporting their motion to intervene as plaintiffs in this case.

The Reno-Sparks Indian Colony ("RSIC") is a federally recognized tribal government formed in 1936 under the federal Indian Reorganization Act. Located in Reno, Nevada, the RSIC consists of 1,157 members from three Great Basin Tribes – the Paiute, the Shoshone and the Washoe. RSIC attaches cultural and religious significance to historic properties that will be affected by the Thacker Pass Lithium Mine Project ("the Project").

Atsa koodakuh wyh Nuwu/People of Red Mountain ("the People") is an unincorporated association of indigenous peoples who share the common cause of enforcing their rights under federal law as members of the Fort McDermitt Paiute and Shoshone Tribe.

Introduction and Background

The Intervenors seek to intervene in this action to challenge the Bureau of Land Management's ("BLM") Record of Decision ("ROD") approving the Thacker Pass Lithium Mine Project Plan of Operations. As noted above, the Reno-Sparks Indian Colony attaches cultural and religious significance to historic properties that will be affected by the Project. Declaration of Michon R. Eben, ¶ 6. Atsa

koodakuh wyh Nuwu/People of Red Mountain ("the People"), located somewhat nearer to the Project, consists of members of the Fort McDermitt tribe who hold, preserve and pass on oral histories about Thacker Pass ("Peehee mu'huh"), regularly perform ceremonies in Peehee mu'huh, hunt and gather in Peehee mu'huh, plan on performing ceremony, hunting, and gathering in Peehee mu'huh in the future, and are concerned with the Project's effects on historic properties located within its footprint. Declaration of Daranda Hinkey, ¶¶ 3-4. The original name for Thacker Pass in the local Numic dialect spoken by members of Atsa koodakuh wyh Nuwu/People of Red Mountain is "Peehee mu'huh," which will be used instead of "Thacker Pass."

Intervenors maintain that BLM's ROD violated the National Historic Preservation Act ("NHPA") 16 U.S.C. §§ 470 *et seq*., and the Administrative Procedure Act ("APA"), 5 U.S.C. §§ 701 *et seq.* because BLM issued the ROD before complying with the NHPA's Section 106 requirements requiring meaningful government-to-government consultation with Indian tribes and before complying with NHPA's Section 106 requirements pertaining to seeking and considering the views of the public in a manner that reflects the nature and complexity of the undertaking. Notwithstanding these violations, Defendant-Intervenor Lithium Nevada Corp. ("Lithium Nevada") still intends to begin destructive, mechanical trenching operations in Peehee mu'huh as soon as July 29, 2021.

The NHPA requires that the BLM must complete the Section 106 process prior to the approval of the expenditure of any Federal funds on the undertaking, or prior to the issuance of any license. The BLM did not complete the section 106 process with the Intervenors prior to issuing the ROD. It appears that the BLM is poised to issue a permit to Lithium Nevada to begin desecration of Peehee mu'huh without completing the Section 106 process with the Intervenors and other Indian tribes, too.

In light of their interest in completing the NHPA Section 106 process before the ROD or any archaeological permits are issued, the Intervenors meet the standards either for intervention as of right under Fed.R.Civ.P. 24(a), or for permissive intervention under Fed.R.Civ.P. 24(b).

Intervention Standards

Intervention as a matter of right is governed by Fed.R.Civ.P. 24(a), which provides:

> On timely motion, the court must permit anyone to intervene who… claims an interest relating to the property or transaction that is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest. Fed. R. Civ. P. 24(a)(2).

When analyzing a motion to intervene as a matter of right under Fed. R. Civ. P. 24(a)(2), the Court applies a four-part test:

"(1) the motion must be timely; (2) the applicant must claim a "significantly protectable" interest relating to the property or transaction which is the subject of the action; (3) the applicant must be so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest; and (4) the applicant's interest must be inadequately represented by the parties to the

action." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011).

In evaluating whether Fed.R.Civ.P. 24(a)(2) requirements are met, the Court follows "practical and equitable considerations" and construes the rule "broadly in favor of proposed intervenors." *Id.* The court does so because "a liberal policy in favor of intervention serves both efficient resolution of issues and broadened access to the courts." *Id.*

Fed. R. Civ. P. 24(b) provides that "[o]n timely motion, the court may permit anyone to intervene who has a claim or defense that has a claim or defense that shares with the main action a common question of law or fact."

Argument

I. Intervenors' motion is timely because it is made early in the proceedings, does not prejudice the other parties, and the Intervenors have only recently learned of the threat to their interests.

Courts weigh three factors in determining whether a motion to intervene is timely: "(1) the stage of the proceeding at which an applicant seeks to intervene; (2) the prejudice to other parties; and (3) the reason for and length of the delay." *Peruta v. County of San Diego*, 771 F.3d 570 (9th Cir. 2014). "Although delay can strongly weigh against intervention, the mere lapse of time, without more, is not necessarily a bar to intervention." *US v. Alisal Water Corp.*, 370 F.3d 915, 921 (9th Cir. 2004)

Intervenors seek intervention at an early stage of the proceedings. There have been no hearings or rulings on substantive matters. The BLM has not yet filed and served the administrative record with the Court. Intervenors are moving to intervene over two months before the Plaintiffs' motion for summary judgment and brief in support of their motion for judgment is due on September 24, 2021, under the Joint Case Management Plan, and nearly five months before the deadline for the Defendants' replies in support of summary judgment on December 12, 2021.

Intervenors are moving to intervene before the preliminary injunction hearing scheduled for July 21, 2021. In *Idaho Farm Bureau Federation v. Babbitt*, 58 F.3d 1392, (9th Cir. 1995), the 9th Circuit ruled that intervention by right was properly granted where intervention was sought before there were hearings or rulings on substantive matters and, although one party had moved for preliminary injunction, intervention was sought before the preliminary injunction hearing. In *Mova Pharmaceutical Corp. v. Shalala*, 140 F.3d 1060, 1074 (D.C. Cir. 1998), the D.C. Circuit found that a district court erred when it denied an applicant's motion to intervene even after "the district court had entered only a preliminary injunction, not a permanent injunction."

"In evaluating prejudice, courts are concerned when 'relief from long-standing inequities is delayed.'" *Alaniz v. Tillie Lewis Foods*, 572 F.2d 657, 659 (9th Cir.1978).

The parties will not be prejudiced by granting the Intervenors' Motion to Intervene. Granting the motion would not delay relief from long-standing inequities because the inequities are not long-standing. It has been less than five months since the complaint in this case was filed. As stated above, there have been no hearings or rulings on substantive matters. The BLM and LNC do not have to file their separate replies in support of their motions for summary judgment until December 13, 2021. The soonest that relief could be granted to any party, then, is more than 5 months away.

The short delay between the Plaintiffs' filing and the Intervenors request to intervene is first attributable to the late stage at which the Intervenors became aware of the Thacker Pass Lithium Mine Project. Atsa koodakuh wyh Nuwu/People of Red Mountain did not learn about the Project until February, 2021. Hinkey Declaration, ¶ 5. Despite the religious and cultural significance the Reno-Sparks Indian Colony ("RSIC") attaches to Peehee mu'huh, RSIC did not learn about the Project or plans to physically disturb the site pursuant to a Historic Properties Treatment Plan until April, 2021. Eben Declaration, ¶ 9. Regardless, "[a]lthough delay can strongly weigh against intervention, the mere lapse of time, without more, is not necessarily a bar to intervention." US v. Alisal Water Corp., 370 F.3d 915, 921 (9th Cir. 2004)

The Project was fast-tracked at a time when the worst pandemic in at least a hundred years was raging around the world. The Project's public commenting period was held online while most of Atsa koodakuh wyh Nuwu live on the Fort

McDermitt Paiute-Shoshone Reservation without reliable internet access. Meanwhile, RSIC never received notice of the Project.

It has been difficult to ascertain what NHPA section 106 consultation the BLM actually has engaged in. Inexplicably, the Notice of Availability of the Final Environmental Impact Statement for the Proposed Thacker Pass Project, published December 4, 2020, stated that "[t]he BLM and Nevada SHPO recently executed a Memorandum of Agreement to resolve adverse effects to the 57 historic properties."

But, then, the Record of Decision contradicted the Notice of Availability and stated:

> "In accordance with the requirements of Section 106 of the National Historic Preservation Act, the BLM coordinated and consulted with the State Historic Preservation Office (SHPO). The BLM received a letter dated Wednesday, October 7, 2020, providing the SHPO's concurrence on the cultural resource report and finding of adverse effect. **A Memorandum of Agreement and treatment plan are being prepared**, and the BLM will continue to consult with the SHPO on the Project and treatment plan in accordance with programmatic protocols." (emphasis added).

Moreover, on June 10, 2021, counsel for Intervenors filed a Freedom of Information Act Request for documentation of consultations the BLM has engaged in with Indian Tribes. However, despite being well outside the statutory timetable for the BLM to provide that documentation, BLM has not provided it. Another reason for the delay in filing is that the Intervenors sought to gain the BLM's agreement to delay physical disturbance of Peehee mu'uh until the Intervenors were adequately consulted under the NHPA without resort to legal

action. See: RSIC June 3 Correspondence to BLM Winnemucca; Atsa koodakuh wyh Nuwu June 24 Correspondence to BLM Winnemucca.

It wasn't until May 27, 2021, when the Plaintiffs moved for a preliminary injunction, that the Intervenors were made aware of the imminence of Lithium Nevada's plans to begin physical disturbance of historic properties in Peehee mu'huh. Based on the Plaintiffs' filings, it seems these plans surprised them, too.

On June 3, 2021, RSIC delivered a letter to Ester McCullough, District Manager of the BLM, Winnemucca District Office, and Ken Loda, BLM, Winnemucca Project Manager. Bryan Hockett, BLM Nevada State Archaeologist, and Shannon Deep, BLM Winnemucca Archaeologist, were copied with the letter. This letter described the BLM's failure to adequately consult regional tribes and requested that the BLM halt any plans for mechanical trenching operations and any other construction activities as part of the Project until meaningful government-to-government consultation with all of the tribes that are connected to Thacker Pass has concluded.

On June 24, 2021, Atsa koodakuh wyh Nuwu/People of Red Mountain, through counsel, delivered a letter to McCullough, Loda, Hockett, and Deep, requesting that the BLM prevent any desecration of Peehee mu'huh until Atsa koodakuh wyh Nuwu/People of Red Mountain have had an adequate time to consult with BLM about mitigating adverse effects to traditional cultural, and historic, properties in Peehee mu'huh.

On July 12, 2021, RSIC received a short response from Kathleen Rehberg, Field Manager, BLM Humboldt River Field Office, denying RSIC's request for NHPA, Section 106 consultation on historic properties affected by the Thacker Pass Project. The letter stated that the consultation period for the public and Native American tribes opened in January 2020 and closed November 5, 2020. With this illegal rejection of RSIC's request for government-to-government consultation under the NHPA, section 106, it became clear to RSIC that it must seek a court order to engage in NHPA, Section 106 consultation. See: Kathleen Rehberg Letter to RSIC.

II. The Intervenors' interest in consultation under the Section 106 process is significantly protectable.

"An applicant has a 'significant protectable interest' in an action if (1) it asserts an interest that is protected under some law, and (2) there is a 'relationship' between its legally protected interest and the plaintiff's claims." *Donnelly v. Glickman*, 159 F.3d 405, 409 (9th Cir. 1998). "The 'interest' test is primarily a practical guide to disposing of lawsuits by involving as many apparently concerned persons as is compatible with efficiency and due process." *Wilderness Soc'y v. U.S. Forest Serv.*, 630 F.3d 1173, 1177 (9th Cir. 2011) (quoting *County of Fresno v. Andrus*, 622 F.2d 436, 438 (9th Cir. 1980)

Here, the Intervenors have a significant interest in ensuring that land they have often hunted, gathered, planted, and prayed on; the site of a massacre of their ancestors; a place where their ancestors hid from soldiers coming to

violently force them on to reservations; artifacts created by their ancestors; an obsidian quarry used by their ancestors; burial sites, and other cultural resources, are not destroyed or desecrated by activities connected to a massive lithium mine before the Intervenors, the general public, and Indian tribes have been meaningfully consulted. This interest is clearly protected by the National Historic Preservation Act and Administrative Procedure Act.

There is a relationship between the Intervenors' legally protected interest and the Plaintiffs' claims. The Plaintiffs seek to enjoin construction of the Thacker Pass Lithium Mine because the BLM failed to comply with the National Environmental Policy Act. The Intervenors seek to enjoin construction of the Mine because the BLM failed to comply with the Section 106 consultation requirements of the National Historic Preservation Act.

The Plaintiffs and the Intervenors attempt two similar routes to the same destination. In fact, the 9th Circuit has stated:

> "A close statutory analog to NHPA is the National Environmental Policy Act ("NEPA"), 42 U.S.C. §§ 4321-4370. What § 106 of NHPA does for sites of historical import, NEPA does for our natural environment. Our circuit has already noted the parallel: Both Acts create obligations that are chiefly procedural in nature; both have the goal of generating information about the impact of federal actions on the environment; and both require that the relevant federal agency carefully consider the information produced. That is, both are designed to insure that the agency "stop, look, and listen" before moving ahead." *San Carlos Apache Tribe v. US,* 417 F.3d 1091, 1097 (9th Cir. 2005) (internal citation omitted).

It is practical and compatible with efficiency and due process to allow Intervenors to intervene. Intervenors have standing to file their proffered complaint on behalf of their members, under the NHPA and APA. If Intervenors

instead are forced to file separately, their claims more than likely would be combined with the Plaintiffs' claims anyway. If the court denies the Intervenors' Motion to Intervene and the Plaintiffs' Motion for Preliminary Injunction under the NEPA, then Intervenors would file a separate complaint, file for a temporary restraining order, and seek a preliminary injunction under the NHPA. It would be more efficient for the court and for all the parties to resolve the issues in one preliminary injunction hearing.

III. Ruling in favor of the BLM and Lithium Nevada would impede the Intervenors' ability to protect their interest in NHPA consultation.

The Intervenors are so situated that the disposition of the action may impair or impede their ability to protect their interests. The Ninth Circuit follows the guidance of Rule 24 advisory committee notes "that state that '[i]f an absentee would be substantially affected in a practical sense by the determination made in an action, he should, as a general rule, be entitled to intervene." *Southwest Center for Biological Diversity v. Berg*, 268 F.3d 810, 822 (9th Cir. 2001). Under the NHPA, the Intervenors have a significantly protectable interest in meaningful and adequate consultation with the BLM before it permits the desecration of Peehee mu'huh and before Lithium Nevada destroys Peehee mu'huh. If the BLM and Lithium Nevada prevail, a massive open pit mine will be constructed on a massacre site, historic properties, and hunting and gathering grounds important to the region's Tribes.

To make matters more urgent, it appears that the Defendants and Lithium Nevada plan to desecrate Peehee mu'huh quickly if the Plaintiffs' Motion for Preliminary Injunction is denied. On May 13, 2021, Lithium Nevada informed Plaintiffs that it intended to begin ground disturbance as soon as June 23, 2021. On May 27, 2021, the Plaintiffs moved for a Preliminary Injunction. On June 8, 2021, in exchange for a two-week extension to file response briefs to the Plaintiffs' Motion for Preliminary Injunction, the BLM and Lithium Nevada stipulated that no Project area ground disturbance activities would occur before July 29, 2021.

The Plaintiffs have moved for a Preliminary Injunction to enjoin mechanical trenching operations on historic properties in Thacker Pass ostensibly authorized by a Historic Properties Treatment Plan under the NHPA. The Preliminary Injunction hearing is currently scheduled for July 21, 2021. If this Preliminary Injunction hearing is disposed of without the Intervenors and their claims under the NHPA, it is likely the BLM and Lithium Nevada will desecrate Peehee mu'huh in violation of the NHPA. This will impair the Intervenors' interest in meaningful consultation with the BLM about the destruction and desecration of land to which the Intervenors attach religious and cultural significance to before that land is destroyed and desecrated.

IV. The Intervenors are not adequately represented because no present party will make all of the Intervenors' arguments, no present party is capable of making such arguments, and the Intervenors offer necessary elements to the proceeding.

"The burden on proposed intervenors in showing inadequate representation is minimal, and would be satisfied if they could demonstrate that representation of their interests 'may be' inadequate." *Trbovich v. United Mine Workers*, 404 U.S. 528, 538 n. 10 (1972). The Ninth Circuit "considers three factors in determining the adequacy of representation: (1) whether the interest of a present party is such that it will undoubtedly make all of a proposed intervenor's arguments; (2) whether the present party is capable and willing to make such arguments; and (3) whether a proposed intervenor would offer any necessary elements to the proceeding that other parties would neglect." *California v. Tahoe Reg'l Planning Agency*, 792 F.2d 775, 778 (9th Cir. 1986).

The Intervenors' interest in being consulted about activities that would desecrate land to which they attach cultural and religious significance under the NHPA is not adequately represented by the current parties in the action. As Lithium Nevada has pointed out in its Response to the Plaintiffs' Motion for Preliminary Injunction, the Plaintiffs have not challenged the Historic Properties Treatment Plan approved by the BLM and State Historic Preservation Office under the NHPA. None of the Plaintiffs represent the interests of Tribes or Native Americans who visit and use Peehee mu'huh. Nor do the Plaintiffs bring any claims under the NHPA.

It cannot be said, then, that the Plaintiffs will "undoubtedly" make all of the Intervenors arguments. So far, in their Complaint, their Motion to Intervene, and their Reply in Support of Motion for Preliminary Injunction, the Plaintiffs have not

made *any* arguments under the NHPA. Moreover, without any Tribal or Native American plaintiffs, the Plaintiffs are not capable of making these arguments. Finally, the BLM's and Lithium Nevada's plan to begin physical disturbance of Peehee mu'huh under the Historic Property Treatment Plan are governed by the NHPA. Arguments under the NHPA are necessary elements to the proceeding that the current parties neglect. Therefore, representation of the Intervenors' interests is inadequate and they should be permitted to intervene as a matter or right.

V. The Intervenors meet the standards for permissive intervention, too.

If the Court does not allow the Intervenors to intervene as of right, the Court should grant the Intervenors permissive intervention. The Intervenors have a claim that shares with the main action a common question of law or fact. Namely, whether the BLM has fulfilled its obligations in permitting the Thacker Pass Lithium Mine Project.

Fed. R. Civ. P. 24(b)(3) requires that, in exercising discretion to allow permissive intervention, "the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights." As described above, no substantive hearings or rulings have been made. The action is still nearly five months before the Court would rule on summary judgment, which gives the parties ample time to respond to the Intervenors' claims. So, granting the Intervenors permissive intervention will not unduly delay or prejudice the original parties and permissive intervention is proper.

WHEREFORE, the Reno-Sparks Indian Colony and Atsa koodakuh wyh Nuwu/People of Red Mountain pray the Court grant them leave to intervene in this matter, pursuant to Fed.R.Civ.P. 24(a)(2) or, alternatively, pursuant to Fed.R.Civ.P. 24(b).

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2021, I filed the foregoing using the United States District Court CM/ECF, which caused all counsel of record to be served electronically.

By: /s/Julie Cavanaugh-Bill
Julie Cavanaugh-Bill (State Bar No. 11533)

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